

No. 15,905 ✓

See also
Vol. 3084

IN THE
United States Court of Appeals
For the Ninth Circuit

WILLIAM DORN, JR.,

Appellant,

VS.

BALFOUR, GUTHRIE & Co., LIMITED, a
corporation,

Appellee.

**MOTION TO RECALL MANDATE, AND PETITION FOR LEAVE
TO FILE SECOND PETITION FOR REHEARING, AND
SECOND PETITION FOR REHEARING.**

GARRY, DREYFUS, McTERNAN & KELLER,
GEORGE OLSHAUSEN,

440 Central Tower, 703 Market Street,
San Francisco 3, California,

*Attorneys for Appellant
and Petitioner.*

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*To the Honorable Walter L. Pope, Frederick G. Ham-
ley and Gilbert H. Jertberg, Judges of the United
States Court of Appeals for the Ninth Circuit:*

Appellant in the above entitled case hereby moves the court to recall the mandate heretofore issued and petitions the court for leave to file a second petition for rehearing, which is hereby presented.

Leave is asked because of new law since the denial of the original petition for rehearing.

Action is by appellant, a longshoreman, against respondent as ship's husband of the SS RIMAC. The court held that the record showed no evidence of control of the ship by appellee and further that appellee owed no duty to the appellant. In the briefs before

this court, appellee had cited *Romero v. International Terminal Operating Co.*, 142 F.S. 570. Appellant's petition for rehearing was denied on February 3, 1959, and the mandate issued to the District Court on February 10, 1959. On February 24, 1959, the Supreme Court vacated the part of the decision in the *Romero* case dealing with the ship's husband. (*Romero v. International Terminal Operating Co.*, 27 L. W. 4161, 4170, 79 Sup. Ct. Rep. 468, 487.) It returned the case to the District Court to consider the question of negligence, independently of employment, operation or control.

Possible negligence on the part of the ship's husband subsumes a duty to the plaintiff. Cf. *C. & O. R. Co. v. Mihas*, 280 U.S. 102, 106. Such negligence may rest upon evidence other than evidence of operation or control of the ship. (*Romero v. I. T. O. Co.*, 79 Sup. Ct. Rep. 468, 487.)

It is submitted that the holding of the Supreme Court in the *Romero* case is contrary to the holding of this court in the present case.

A rehearing should be granted to consider the effect of the Supreme Court's decision.

Dated, San Francisco, California,
March 16, 1959.

Respectfully submitted,
GARRY, DREYFUS, McTERNAN & KELLER,
GEORGE OLSHAUSEN,
*Attorneys for Appellant
and Petitioner.*